

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA )  
 ) Case No. 6:17-CR-6016  
 ) Case No. 6:17-CR-6017  
 ) (CJS)(JWF)  
 Plaintiff, )  
 )  
 vs. ) February 15th, 2017  
 )  
 RICHARD L. WILBERN, )  
 )  
 )  
 Defendant )

**TRANSCRIPT OF DETENTION HEARING  
BEFORE THE HONORABLE JONATHAN W. FELDMAN  
UNITED STATES MAGISTRATE JUDGE**

APPEARANCES:

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1 THE CLERK: This is 17-CR-6016 and 17-CR-6017.

2 THE COURT: Good afternoon. We're here for a  
3 detention hearing with respect to Mr. Wilbern.

4 I just want to place on the record what I have. I  
5 have a memorandum from the government regarding the  
6 government's detention motion with respect to both  
7 indictments, although it's -- the filing number is the 6017  
8 indictment. I have the government's response and a reply by  
9 the defendant.

10 I also have a letter from Ms. Burger regarding some  
11 personal history and characteristics of the defendant, dated  
12 yesterday, that was faxed to my chambers, which I have  
13 reviewed. It also contains a CV of Gary Skuse, Dr. Skuse and  
14 I have an abbreviated Pretrial Services report, which just  
15 contains the criminal history of the defendant. It's my  
16 understanding that defense did not want the defendant  
17 reviewed -- or interviewed by Pretrial Services?

18 MS. BURGER: Yes, that's correct.

19 THE COURT: Okay. Then, are we -- did I get  
20 everything? Are we ready to proceed?

21 MS. BURGER: You didn't mention the initial filing,  
22 document 17, but I think that the Court referenced having  
23 received it when we were last together.

24 THE COURT: What was that now?

25 MS. BURGER: Document 17. That was the initial

1 affirmation relating to --

2 THE COURT: Oh. Right. Right. Okay. Yep. All  
3 right. So, I think we have two indictments. So, I'd like to  
4 go in order, starting with 17-CR-16 and hold the detention  
5 hearing as to that.

6 MR. GREGORY: Judge, it would be our intention,  
7 really, because a lot of the same circumstances and facts  
8 which would support detention would apply to both.

9 THE COURT: Okay.

10 MR. GREGORY: I think it makes sense, with the  
11 Court's permission, to articulate our basis for detention with  
12 regard to both of those charges.

13 THE COURT: Any objection?

14 MS. BURGER: I don't have an objection, but I think  
15 that -- I intend to make an argument with respect to  
16 indictment ending 6 that under some new Supreme Court case  
17 law, the 922(g) charged in that indictment does not qualify as  
18 a crime of violence for the purposes of the Bail Reform Act.  
19 So, with that understanding, I don't have any objection to  
20 handling them together.

21 THE COURT: Okay. Then, the government may proceed.

22 MR. GREGORY: Thank you, Judge. Just for the record,  
23 the government is moving for the pretrial detention on both  
24 indictments pending before this Court pursuant to Title 18,  
25 United States Code, Section 3142(f)(1)(A), because the

1 offenses charged, as I see it, that is, the 2003 armed credit  
2 union robbery resulting in the shooting death of Raymond  
3 Batzel and the 2016 unlawful possession of a firearm by a  
4 convicted felon are both, categorically, a crime of violence.  
5 Certainly 922(g) has been shown to be a crime of violence in  
6 the 2nd Circuit.

7 I would also move, under Title 18, United States Code  
8 Section 3142(f)(2), as I believe that the facts and  
9 circumstances of this case indicate that the defendant poses a  
10 serious risk of flight. I would also rely on the statutory  
11 rebuttable presumption that in these types of cases there are  
12 no -- no conditions or combination of conditions which would  
13 assure the appearance of the defendant as required and the  
14 safety of the community.

15 With regard to the first (g) factor, the nature and  
16 circumstances of the crime, as the Court is now well aware, on  
17 August 12th, 2003, at approximately 9:45 a.m., Richard Wilbern  
18 entered the Xerox Federal Credit Union. He was wearing a dark  
19 blue, long-sleeved nylon jacket with the letters FBI written  
20 in yellow across the back and on the sleeve. He wore dark  
21 sunglasses and a poorly-fitting, Afro-style wig.

22 He was also carrying a large briefcase and a green  
23 colored umbrella. He also had a United States Marshals badge  
24 hanging on a chain around his neck. Witnesses also described  
25 that he was wearing a bulletproof vest.

1           Once inside the bank, Wilbern proceeded almost  
2 directly into a cubicle occupied by a female employee. And  
3 once inside her cubicle, he sat in a chair, he placed the  
4 umbrella in front of him on the desk of the employee and he  
5 maintained the briefcase at or near his feet. Wilbern then  
6 explained to the employee, in sum and substance, that he was  
7 there to conduct a security assessment and to stage  
8 essentially, a robbery.

9           This led to some additional conversation with a  
10 female employee who gave a bit of push back and asked more  
11 pertinent questions -- asking more pertinent questions as to  
12 the identity -- the true identity of this individual.

13           At that point, Wilbern reached down and removed two  
14 firearms from the briefcase. And at that point, according to  
15 the witness, his attitude completely changed. One of the  
16 firearms was described as a handgun and the other as a sawed-  
17 off rifle or shotgun. He also removed from that same bag  
18 another bag, which he ultimately instructed the female  
19 employee to take, walk to the front counter and fill the bag  
20 with money.

21           While the employee walked towards the counter,  
22 Mr. Wilbern began to lay employees down inside of the bank.  
23 There were also customers inside the bank. After laying two  
24 people down in an office, Mr. Wilbern confronted Raymond  
25 Batzel, a customer of the credit union, who had just finished

1 a transaction at the teller stand. According to the  
2 witnesses, Batzel refused to lie down. He refused to go where  
3 he was instructed to go, which caused Mr. Wilbern to raise the  
4 firearm, which is captured on the video, shooting Mr. Batzel  
5 in the neck, severing his spine and essentially causing  
6 massive internal damage, which resulted in his almost  
7 immediate death.

8 At the same time that that shooting occurred, another  
9 customer was entering the credit union and upon seeing what  
10 had just transpired, turned and tried to flee from the bank.  
11 Upon seeing that, Mr. Wilbern then turned his aim towards that  
12 individual and shot him in the back as he was running outside  
13 of the bank.

14 After shooting both of these customers, Mr. Wilbern  
15 quickly returned to the teller counter and he told the credit  
16 union employees to fill the bag with cash. Mr. Wilbern was  
17 able to obtain approximately \$10,000 in cash, which he put it  
18 inside the briefcase. He then took that bag, that briefcase,  
19 and he fled the credit union.

20 But in his haste to leave the bank, he forgot to  
21 retrieve the umbrella that he initially brought into the  
22 credit union and that umbrella was still lying on the  
23 employee's desk, the same location he placed it when he first  
24 walked into the employee's cubicle. And in the aftermath of  
25 that incident, the umbrella was secured as evidence.

1 With regard to the 3142 (g) factors -- (g)(2)  
2 factors, I would submit there exists compelling evidence which  
3 demonstrates the defendant's participation in this crime. And  
4 I think some of the examples of the proof that the government  
5 is in possession of will demonstrate just that.

6 I'll start with the umbrella left at the scene. In  
7 August 2003, the umbrella was swabbed for the presence of DNA.  
8 Sterile swabs were used to take two sets of samples from  
9 certain locations on the umbrella. Long story short, while  
10 DNA was detected, given the testing kit filled at that time at  
11 the Monroe County lab, no DNA profiles were able to be  
12 obtained.

13 We then fast-forward to 2011 when a -- the second set  
14 of swabs obtained from that umbrella, from those various  
15 locations, was transferred to the Office of the Chief Medical  
16 Examiner in New York City. By 2011, OCME had been utilizing  
17 low copy number testing for approximately six years after  
18 being accredited to do so by the New York State Commission on  
19 Forensic Science in 2005.

20 As to the swab taken from the umbrella wraparound  
21 closure, OCME determined that there was a mixture of DNA  
22 located at that location from at least two people. However,  
23 OCME further determined that a full, 15-loci DNA profile could  
24 be generated and that a major contributor of the DNA could be  
25 identified.



1           In August of 2016, OCME compared the 2011 DNA full  
2     profile of the major contributor to the known DNA profile of  
3     Mr. Wilbern and it resulted in a match at all 15 loci  
4     positions. According to OCME, the probability of finding that  
5     match again in the general population was more than one in  
6     6.8 trillion people, or about 1,000 times the population of  
7     the planet Earth.

8           As to the second location, which was described as the  
9     umbrella latch mechanism, OCME was able to determine that this  
10    was a single-source contributor, that is, only one person  
11    contributed to the DNA which was located at this location. In  
12    this case, they were able to obtain a partial DNA profile at  
13    ten loci, still a very significant number of loci and all of  
14    which were consistent with the DNA profile found on the  
15    umbrella wraparound closure and also with the known DNA  
16    profile of Mr. Wilbern.

17          Given that ten loci match, OCME determined that the  
18    probability of finding that match again in the general  
19    population was one in 138 million people or approximately one  
20    of two people living in the United States. Now, there's no  
21    question -- and we've already seen it, Judge, with the  
22    submissions -- that we will argue the admissibility the DNA in  
23    this case. We've already started that process.

24          But I would note, just as a general observation, it's  
25    worthy to note that the DNA match, which was obtained by OCME,

1 did not come back to some random person living, say, out in  
2 Sayville, New York or Plattsburgh, New York. Rather, it was a  
3 match to a man with a criminal background, that already  
4 included an armed bank robbery, here in Monroe County. It was  
5 a match to a man who was previously convicted of possessing a  
6 sawed-off shotgun. But more importantly, it was a match to a  
7 man with significant and undeniable ties to the Xerox  
8 Corporation in Webster, New York.

9           For example, there is no question that Richard  
10 Wilbern was very familiar with the expansive Xerox Campus in  
11 Webster, New York. He was employed at Xerox with a hire date  
12 of August 11th, 1997, although he worked there earlier as a  
13 temporary employee since September of 2006 (sic). He worked  
14 in Building 200, which is located just north of the Xerox  
15 Credit Union, Building 304. And what has admittedly been  
16 derived from some 20/20 hindsight, it very clear that the  
17 defendant was a disgruntled and agitated Xerox employee.

18           In August of 2000, while employed at Xerox, Wilbern  
19 brought a lawsuit against Xerox, alleging that Xerox  
20 unlawfully discriminated against him, subjected him to a  
21 hostile work environment, failed to hire him for a position  
22 for which he applied, solely based upon his race.

23           Mr. Wilbern was then fired in February of 2001 for a  
24 number of employment-related reasons which prompted him to add  
25 to his civil lawsuit, which remained pending, claiming that

1 Xerox retaliated against him for complaining about Xerox  
2 discriminatory practices. All of those claims would  
3 ultimately be dismissed in December of 2002 by Federal Court  
4 Judge Mike Telesca, for failing to state a claim upon which  
5 relief could be granted.

6 Not only was Mr. Wilbern familiar with Xerox and the  
7 Webster Xerox Campus, he was also very familiar with the  
8 credit union which, again, is housed within Building 304, in  
9 which, if you're not an employee, can be a very difficult  
10 location to find.

11 For example, credit union records show that  
12 Mr. Wilbern maintained an account at the Xerox Federal Credit  
13 Union. He maintained his account at Xerox from roughly May  
14 of 1998 through August 2004. Not only were his paychecks  
15 direct deposited, but records show he'd been inside the  
16 Building 304 on numerous occasions.

17 For example, bank records obtained from 2002 and 2003  
18 show that Wilbern presented himself personally at the Building  
19 304 branch. He appeared there on September 13th, 2002, but  
20 then not again until seven months later, after his lawsuit was  
21 dismissed. Starting on April 9th, 2003, right through  
22 July 29th, 2003, which was just two weeks before the robbery,  
23 Mr. Wilbern was personally inside Building 304 of the Xerox  
24 Federal Credit Union making transactions, including making  
25 small cash deposits or depositing money in order to receive

1 cashier's checks; Seven different occasions from April through  
2 the end of July 2003. What is very curious is that after the  
3 robbery occurred on August 12th, 2003, all the way up until  
4 his account was closed for insufficient funds in August 2004,  
5 there is no record of Mr. Wilbern ever going back inside  
6 Building 304.

7 Now, it's public knowledge that a citizen's tip  
8 directed law enforcement towards Mr. Wilbern and that occurred  
9 in 2016. And since that tip was generated, both before and  
10 after Mr. Wilbern's arrest, state, local and federal  
11 investigators have done their due diligence in terms of  
12 corroborating, locating additional witnesses and unearthing  
13 additional evidence in this case apart from, obviously, what  
14 is key DNA evidence.

15 Just by way of example, I do anticipate that there  
16 would be, as witnesses called by the government, several  
17 individuals who were very close and familiar with Mr. Wilbern.  
18 More particularly, they were each very familiar with  
19 Mr. Wilbern and the way he appeared in August of 2003. I  
20 expect testimony from several of those individuals, in  
21 addition to the actual tipster, to positively identify Richard  
22 Wilbern as the man who is depicted in the bank surveillance  
23 photographs.

24 I also expect testimony from witnesses who will  
25 testify that Mr. Wilbern was in possession of a knockoff FBI

1 jacket, both prior to and well after the robbery. And there  
2 will likely be testimony with regard to where and when that  
3 FBI jacket and the U.S. Marshals badge were purchased.

4 Most notably, I anticipate specific testimony that  
5 the defendant had previously worn that poorly-fitting Afro  
6 wig, as he did the day he committed the robbery, on other  
7 occasions, perhaps to cover up the short, dreadlocked hair  
8 that he had at that time that was growing -- at that point in  
9 his life. Those same short dreadlocks were clearly evident in  
10 his booking photo on January 6th, 2004 when he was arrested in  
11 the State of Ohio.

12 THE COURT: Say that last one again.

13 MR. GREGORY: The same short dreadlocks that I  
14 referred to are clearly evident in the photograph, a booking  
15 photo, which was taken on January 6th, 2004 when he was  
16 arrested in the State of Ohio. I do have that picture if the  
17 Court would like to see it.

18 THE COURT: Okay.

19 MR. GREGORY: The umbrella has also provided us with  
20 additional information, other than simply being an item which  
21 hosted the defendant's DNA. When the umbrella was first  
22 secured as evidence, the technician made a note that all of  
23 its labels were in Chinese or in Japanese. As it turns out, a  
24 Japanese linguistic expert that we've retained has indicated  
25 that the labels and markings are entirely in the Japanese

1 language. For example, the labels indicate the umbrella was  
2 made in Japan. One label stated fancy umbrella in Japanese  
3 characters. And another label listed the name of the  
4 distributor, the merchandiser as Wakamatsuya, all in Japanese  
5 symbols. Other than the word crane, there are no other  
6 English characters on the umbrella; it's entirely in Japanese  
7 characters.

8 One of the sticker's labels also contain the name of  
9 a popular tourist destination called Shiba Shina (phonetic),  
10 which is a shortened form of the name Shiba Daijingu, a well-  
11 known Shinto Shrine and tourist attraction located in Shiba  
12 Park in Minato Ward of Tokyo, Japan.

13 So, how could Mr. Wilbern possibly get his hands on a  
14 Japanese umbrella from Minato Ward in Tokyo, Japan? Well,  
15 U.S. Customs and Border Patrol have indicated to us in the  
16 years leading up to the August 2003 robbery, Mr. Wilbern spent  
17 quite a lot of time in the country of Japan. In fact, from  
18 August 1997 to August 2002, Mr. Wilbern traveled to Tokyo,  
19 Japan on at least 14 different occasions. He even traveled  
20 there with his son Rayard (phonetic) in April of 1999.

21 Mr. Wilbern took time off from work at Xerox and told  
22 several of his coworkers that he was over there conducting  
23 business. We've also been able to establish that the business  
24 that he was conducting was drug dealing, drug distribution and  
25 money laundering.

1 THE COURT: Wait. Before you move on from the  
2 umbrella, the stickers that are on the umbrella are stickers  
3 that were placed on the umbrella after it was purchased or  
4 were on the umbrella at the time it was purchased?

5 MR. GREGORY: We have no way of knowing that. We  
6 just know that when they were found lying on the desk of the  
7 employee, it had all the stickers on it.

8 THE COURT: Okay. And was the umbrella sold within  
9 the United States?

10 MR. GREGORY: We have not been able to determine.  
11 Again, it's all Japanese markings. It appears that it was  
12 sold in Japan.

13 THE COURT: And when you say appears, it's based on  
14 the stickers?

15 MR. GREGORY: The merchandiser information indicating  
16 Wakamatsuya, which according to our linguistic expert, the ya  
17 at the end of Wakamatsu indicates that that would be a store.

18 THE COURT: All right.

19 MR. GREGORY: I expect, Judge, that there will be  
20 testimony from witnesses who will indicate that during that  
21 time period, Mr. Wilbern and several other associates from  
22 Philadelphia, Pennsylvania and potential suppliers in the area  
23 of San Diego, California, all participated in an ongoing  
24 scheme to transport and distribute narcotics from the  
25 United States to Tokyo, Japan, where they were able to

1 generate large profit margins. On most of the occasions when  
2 the group traveled to Japan they stayed at a hotel called the  
3 Asia Center of Japan, which is located in the heart of the  
4 Minato Ward in Tokyo.

5 But what is even more important, I think, for the  
6 Court's consideration in terms of bail, is that not only was  
7 Mr. Wilbern allegedly involved in laundering proceeds and  
8 distributing narcotics, but that Mr. Wilbern made all of these  
9 trips out of the country while he was under probation  
10 supervision, yet he never informed any probation officer that  
11 he was doing that.

12 As the PSR notes on page three in detailing the  
13 criminal history, the defendant was arrested in Chesterfield,  
14 Virginia on May 1st, 1992. We've been able to secure the  
15 probation records from Virginia. After serving a short prison  
16 sentence for traffic and larceny charges, he began his  
17 supervision on May 17th, 1993 upon his release from  
18 confinement.

19 His supervision was then transferred to Richmond,  
20 Virginia on July 14th, 1993. The Virginia records indicate in  
21 their CHRONO notes that, "The subject's supervision by our  
22 Richmond office remained fairly uneventful until he failed to  
23 contact their office earlier this year. And as a result of  
24 this, his home was visited on March 9th, 1995. Upon visiting  
25 the home, the officer observed that the house appeared vacant.



1 Additionally, the subject's telephone had been disconnected.  
2 The subject failed to report to the district office on January  
3 4th, 1995; February 1st, 1995 and March 1st, 1995.  
4 Thereafter, a Show Cause Order was issued on March 27th, 1995,  
5 stating that Wilbern had absconded from supervision and that  
6 his whereabouts were unknown."

7           We skip ahead to late 2000, where, apparently, the  
8 defendant responded to the Show Cause Revocation Order in  
9 which the Richmond Court, at that time, ordered that the  
10 defendant's previously suspended sentence be revoked and that  
11 the Court sentenced him to a period of incarceration of five  
12 years, but that the Court resuspended that term of  
13 incarceration and again placed him on probation. The Court  
14 then, because it appeared that the defendant was living in  
15 New York, authorized the transfer of his Virginia probation to  
16 the State of New York.

17           On November 16th, 2000, the New York State Division  
18 of Probation approved the transfer and began supervision of  
19 the defendant by the Monroe County Probation Department. On  
20 January 2nd, 2001, the Monroe County Probation Department sent  
21 a letter to Virginia, indicating that the Monroe County  
22 Probation Department would provide courtesy supervision  
23 effective immediately and the Monroe County CHRONO notes  
24 indicate that Wilbern met with his probation officer and went  
25 over the terms and conditions of that probation.

1           According to the probation officer, Mr. Wilbern was  
2 granted travel for the following dates: June 22nd, 2001 to  
3 June 27th, 2001 to Chapel Hill, North Carolina to drive his  
4 son to a basketball camp; June 30th, 2001 to July 2nd, 2001 to  
5 Salisbury, Connecticut to drive his son to play for a summer  
6 school; July 11th, 2001 to July 12th, 2001 to Salisbury,  
7 Connecticut to visit a school where the son attends and July  
8 8th, 2002 to July 9th, 2002 and July 26th, 2002 and July 27th,  
9 2002 to drive his son to Robert Morris College to take him to  
10 a basketball camp and then, in August 2002, to pick him up.

11           At no point was he ever granted permission by Monroe  
12 County Probation to go to the country of Japan. Yet, without  
13 that permission, he traveled to Japan in February 2001,  
14 April 2001, June 2001, October 2001, December 2001, March 2002  
15 and August 2002. On September 19th, 2002, Mr. Wilbern -- his  
16 term of probation ended without probation ever knowing that he  
17 had left the country.

18           By September 2002, the defendant was, in fact, off of  
19 supervised release or probation and he was living in Fairport,  
20 New York, but his finances were anything but stable. For  
21 example, for a variety of reasons, the Japanese drug  
22 trafficking experiment was over. After August of 2002, he  
23 never traveled there again and lost that stream of disposable  
24 income. He had already lost his job at Xerox and was, at  
25 best, making some money doing temporary work or participating

1 in clinical medical trials all across the country, as well as  
2 receiving aid from the Department of Social Services. In  
3 November 2002, in an application for family assistance through  
4 Monroe County, he indicated that he had no job and no food.  
5 One month later, in December of 2002, his federal lawsuit  
6 against Xerox seeking monetary damages was dismissed by Judge  
7 Telesca and any hope to receive any money from that lawsuit  
8 was extinguished.

9 In January 2003, Wilbern completed another  
10 eligibility questionnaire through Monroe County DSS. And in  
11 that application, he stated that he had no income, had a  
12 growing son, gas bills, et cetera. He also wrote the word  
13 "desperation" on his application. In March 2003, he was sued  
14 by the RG&E for failure to pay roughly \$2,167. IRS tax  
15 records indicate that in 2002, he claimed an adjusted gross  
16 income of \$11,629 and that in 2003, he claimed taxable income  
17 of just \$4,982.

18 Add to all of that financial stress, his son, Rayard,  
19 had earlier that year been accepted into the Winchendon  
20 School, which is a private New England boarding school located  
21 in Winchendon, Massachusetts. Rayard actually matriculated  
22 into the school in the Fall of 2003. The problem for  
23 Mr. Wilbern is that Winchendon came at a yearly cost of  
24 \$32,850.

25 The problems were only compounded when he was advised

1 by Winchendon that his son was only going to be given  
2 financial aid for a third of it, a \$10,000 grant and that he  
3 would be responsible for the balance. In a faxed letter he  
4 sent from the Kinko's store located at 821 Fairport Road, he  
5 told the school that Rayard, "must start. Then, I can work on  
6 it and I will, hook or crook, by the end of the year pay the  
7 balance." Two days later, the school emailed Mr. Wilbern  
8 indicating that he would get \$10,000 in aid, but he would have  
9 to pay \$22,850.

10 I would submit, Judge, that by the end of the summer,  
11 when his son was headed off to Winchendon, the defendant was  
12 in financial dire straits and had every reason to commit a  
13 bank robbery.

14 Now, I can't stand here, Judge and provide an  
15 acceptable answer to the Batzel family, or anyone for that  
16 matter, why it was that law enforcement was not able to solve  
17 this case sooner. But regardless of when the crime was  
18 solved, the fact remains that Mr. Wilbern was capable of  
19 violence then and I would submit that he remains a very  
20 dangerous person even now.

21 Why do I say that? Well, on September 27th, 2016, in  
22 the aftermath of his arrest on the credit union charges and  
23 based upon a court-issued search warrant, law enforcement  
24 searched 23 Tubman Way, where Mr. Wilbern stayed with his  
25 girlfriend Ferran Scott and her mother, along with two young

1 children, including his own. According to Ms. Scott, the  
2 defendant was in and out of town, but when he was in town, he  
3 would stay at her house. The defendant was permitted to store  
4 some of his personal belongings in Ms. Scott's garage,  
5 including furniture, clothes and other items. All of these  
6 items he had previously maintained at a property located at  
7 766 Hudson Avenue in the City of Rochester.

8 When agents searched the garage and they located his  
9 belongings, they located an organizer-type notebook, which,  
10 when opened, contained a full-face, black ski mask. They also  
11 located four semi-automatic rifles. They located a 9-mm  
12 rifle, semi-automatic, which was loaded with 25 rounds.  
13 According to the owner of this gun, this gun was stolen  
14 approximately ten years ago.

15 They found a Norinco SKS-type rifle. That, too, was  
16 loaded with 11 rounds of 7.62x39 caliber ammunition. They  
17 located an SAA Model SA-15 semi-automatic rifle and they  
18 loaded -- located a Kel-Tek Model Sub -- Sub-2000, which is a  
19 .40 caliber Smith and Wesson rifle. They also located three  
20 empty magazine clips, all of which were located in a gun case.

21 As the complaint in this case stated in -- we've  
22 obtained additional sworn testimony. Both the defendant's  
23 girlfriend and her mother have indicated that the items that  
24 were located in the garage belonged to the defendant; that he  
25 was the only person that was permitted to store items in their

1 garage and that the guns certainly did not belong to them and  
2 had they known the guns were there, particularly with two  
3 young children in the house, they would have had them removed.

4 I mentioned that the defendant moved many of his  
5 personal belongings from 766 Hudson Avenue to his girlfriend's  
6 residence for storage. Why did he do that? Well, 766 Hudson  
7 Avenue was previously owned by the defendant, having purchased  
8 the property in January of 2008. 766 Hudson Avenue is a  
9 commercial property with a restaurant on the first floor and  
10 an office/living space upstairs.

11 Since he took over the property in 2008, Wilbern  
12 allegedly failed to pay almost \$31,000 in property taxes,  
13 resulting in a tax lien being placed on the property. By  
14 March 2015, the property was lawfully foreclosed upon and the  
15 property was sold to a Florida-based company, American Tax  
16 Funding, who later sold it to a Rochester-based company called  
17 SCR Development in February of 2016.

18 As of that date, SCR Development became the lawful  
19 owner of the property and all of its contents and its  
20 fixtures. SCR Development entered the property in March of  
21 2016, changed all of the locks and began the process of  
22 rehabilitating the property, so that they could flip it and  
23 sell it.

24 None of this sat well with Mr. Wilbern. In fact, he  
25 commenced a lawsuit against both American Tax Funding and

1 SCR Development in May of 2016. And in that lawsuit, he  
2 claimed, among other things, fraud and unlawful eviction.  
3 That case, I believe, remains pending. But what's interesting  
4 is that Mr. Wilbern's personal affidavit, that he filed in  
5 support of his civil complaint, states that even after the  
6 foreclosure occurred in March of 2015, where his ownership  
7 rights were lawfully extinguished, he nevertheless continued  
8 to occupy and maintain the premises, even through March of  
9 2016, as he alleges in his documents.

10 Why is that important? Well, in March of 2016, when  
11 SCR went into the premises to clean it out and secure it and  
12 change the locks, they did, in fact, find Mr. Wilbern's  
13 personal property. They noted that the downstairs was a  
14 restaurant, but it had obviously not been in -- not been used.  
15 It hadn't been operating. And the upstairs area, where  
16 Mr. Wilbern's personal items were located, SCR employees  
17 located a number of things. I'm not going to detail  
18 everything that was found at this point, only the things that  
19 I think are relevant for your consideration on dangerousness.

20 But they did find paperwork, mail and other items  
21 belonging to the defendant. They found an assortment of  
22 clothes and jackets in a freestanding armoire. They found  
23 literally hundreds of rounds of various caliber ammunition,  
24 both boxed and loose. They found several gun holsters. They  
25 found several empty ammunition clips. They found two full-

1 torso bulletproof vests. They found a Diamond tactical long  
2 gun body holster for a long gun. They found full-face ski  
3 masks and camouflage masks. And they found a loaded  
4 Remington 12-gauge shotgun.

5 The point, I guess, I'm trying to make here, Judge,  
6 is with regard to the information at both Tubman Way and  
7 766 Hudson Avenue, is that this defendant, a convicted felon,  
8 remains, even to this day, a very dangerous convicted felon  
9 with clear access to high-powered weapons, ammunition and body  
10 armor.

11 I'll sum up with this. Given the facts of the  
12 underlying case, which clearly involve the most violent type  
13 of crime imaginable and given the recent possession of several  
14 loaded weapons, ammunition, ski masks, body armor, holsters,  
15 God knows what Mr. Wilbern was up to or what he was planning.  
16 I would respectfully suggest that this might indicate, to a  
17 reasonable person, that the defendant is still very capable of  
18 committing a similar act or similar acts and no amount of  
19 money or houses that could be put up can ameliorate that.

20 Anyway, given everything that I've proffered, Judge  
21 and in light of the life sentence the defendant would face if  
22 he was convicted as well as his poor track record under  
23 supervision, I would respectfully submit that there are no  
24 conditions or combination of conditions which would reasonably  
25 assure the presence of the defendant as required and the



1 safety of this community. Thank you.

2 THE COURT: Thank you. Ms. Burger?

3 MS. BURGER: Thank you. Before I begin my formal  
4 remarks, I have to say I'm somewhat surprised that there isn't  
5 additional direct evidence that the government has somehow  
6 been able to come up with in light of the problems with their  
7 DNA evidence.

8 The very idea that Mr. Wilbern is accused of these  
9 serious offenses, based on what I can now hear from the  
10 government's proffer, is a purely circumstantial case, based  
11 on this DNA evidence. It's our position that -- that this  
12 Court is in, I think, an even stronger position to consider  
13 releasing Mr. Wilbern on conditions.

14 THE COURT: Let me interrupt for a second, because  
15 maybe I missed it, but -- or maybe I misheard it -- but I  
16 thought Mr. Gregory said that he has several witnesses who  
17 will testify that Mr. Wilbern is the man in the bank  
18 surveillance photographs.

19 MS. BURGER: Well, perhaps I heard it a little  
20 differently than you did, Judge. The way I heard it --

21 MR. GREGORY: I can tell you exactly what I said.

22 THE COURT: Okay.

23 MR. GREGORY: I do anticipate that there will be  
24 witnesses who will affirmatively identify the defendant as the  
25 person who is depicted in the photo.

1 MS. BURGER: So, then your people are going to say,  
2 oh, I'm looking at this video, this two-dimensional image of  
3 the robbery of the credit union. I recognize the person  
4 depicted in that image. These are not people who are saying,  
5 I was there, I saw Richard Wilbern. That's not going to be  
6 the case from what the government's proffer is.

7 And then, we're going to have people who apparently  
8 did not come forward for more than a decade, perhaps including  
9 the Monroe County probation officers who supervised  
10 Mr. Wilbern for a number of years, in terms of time in close  
11 proximity to when the robbery occurred; presumably none of  
12 them came forward. Other people from the community knew  
13 Mr. Wilbern as a long-time employee at Xerox. We don't have  
14 people in that context who came forward in a timely fashion.

15 What we have, it sounds like, if I'm -- a lot of this  
16 I'm hearing for the first time from the government, because we  
17 have not received much substantive discovery yet, sounds to me  
18 to be sort of prior bad act type evidence. The references to  
19 drug trafficking were a very long time ago. And it's unclear  
20 if the government is offering someone in the drug case, some  
21 inducement to somehow implicate Mr. Wilbern from the pictures  
22 in the bank. I mean, I heard a lot of sort of prior bad act  
23 404(b) type claims that I would imagine wouldn't be admissible  
24 at a trial in the Xerox allegations in any event.

25 But I think if we come back to what the lynchpin of

1 their case is in the complaint, it's the DNA. And the most  
2 disturbing fact that I've been able to uncover, having nothing  
3 more than that 20 or 30 pages of the DNA results, none of the  
4 actual technical reports, the testing protocols in this  
5 particular case that were done. What I found is, the  
6 Department of Justice, at the very time when these samples  
7 were being analyzed in New York City, was taking a polar  
8 opposite position from the position that Mr. Gregory's office  
9 is taking today.

10 And in that case, they took the position that low  
11 copy number DNA testing was highly unreliable, to the point  
12 that they fought tooth and nail in another Federal Court, in  
13 another part of the country, to have a judge prohibit a  
14 defendant from having evidence be tested in an effort to prove  
15 that defendant's innocence. That is something that I haven't  
16 heard anything from -- with the government; how the Department  
17 of Justice, in one instance, can say a particular technique is  
18 reliable and in another instance say the very same technique  
19 is completely unreliable.

20 And I think that speaks volumes; that that's not what  
21 the Court heard the government comment on today during their  
22 proffer. Instead, it was a lot of this 404(b) type  
23 information. You know, I think other factors that -- that the  
24 Court may not be aware of, to read the complaint, very one-  
25 sided picture of the government's case. Reading it, one would

1 have no idea that there were any questions, whatsoever, about  
2 the reliability of this particular type of DNA testing, in  
3 spite of the fact the Department of Justice, in 2011, took the  
4 position that it was highly unreliable and should never be  
5 used.

6 What the Court may also not be aware of is that in  
7 the few reports we've received so far, witnesses in the  
8 immediate aftermath of the robbery did not provide one height  
9 for the perpetrator of the robbery, for this subject in the  
10 FBI jacket.

11 Instead, we have witnesses in the reports we've  
12 received so far, saying that the perpetrator was anywhere from  
13 roughly, if I remember correctly, five foot, seven to six  
14 foot, six or six foot, seven. But to read the complaint, the  
15 government presents a picture that almost -- almost as if the  
16 height that was provided uniformly was six foot which,  
17 coincidentally, it says is Mr. Wilbern's height.

18 If you look at some of these witness statements,  
19 there's a huge discrepancy between the age of the perpetrator,  
20 as described by actual witnesses who were in the credit union  
21 at the time of the robbery, as compared with Mr. Wilbern's age  
22 at the time.

23 You hear Mr. Gregory talk about how all the hopes of  
24 recovering in his lawsuit against Xerox were lost when the  
25 case was dismissed. That is flatly untrue when you look at

1 the docket sheets of the case. The case was immediately up on  
2 appeal. And even at the time of the robbery at Xerox, the  
3 case was still pending, on appeal, at the 2nd Circuit. That  
4 case was not closed. It was not a situation where all hope  
5 was lost.

6 And incidentally, in doing a quick search on other  
7 discrimination cases against Xerox in the same -- roughly the  
8 same timeframe, I found lots of discrimination lawsuits,  
9 approaching 100, that were pending at any given time against  
10 Xerox, raising all kinds of age, race, sex discrimination.  
11 This is not unique to Mr. Wilbern.

12 With respect to the government's proffer that  
13 Mr. Wilbern was consistently in the bank making suspiciously  
14 small deposits suspiciously small transactions, I've not seen  
15 anything in the discovery we've received so far that indicates  
16 any of the tellers or any of the personnel from the bank  
17 indicated that the person was at all familiar to them as a --  
18 as a frequent customer or someone who was coming into the bank  
19 on a frequent basis.

20 With respect to the umbrella, I think the Court had  
21 its finger on that problem with the umbrella in that there's  
22 no confirmation the umbrella wasn't sold any place outside of  
23 Japan. To get to some of the legal issues in the case, it's  
24 our position that in spite of the *Dillard* case from the 2nd  
25 Circuit, which a number of years ago concluded that 922(g) was

1 a crime of violence, that this Court is not confined by the  
2 *Dillard* ruling, in light of the *Johnson* case that came out in  
3 2015. It was that Supreme Court case where the Supreme Court  
4 held unconstitutionally vague the clause in ACCA that it is,  
5 for all practical purposes, identical to the crime of violence  
6 definition in the Bail Reform Act.

7 And our position is, as a result, that the Court does  
8 not have the authority to consider detaining Mr. Wilbern for  
9 purposes of a crime of violence in conjunction with the 922(g)  
10 offense.

11 THE COURT: Well, the *Johnson* case was decided a bit  
12 ago. Is there any case --

13 MS. BURGER: 2015.

14 THE COURT: Yeah. Is there any case that's held  
15 that?

16 MS. BURGER: There have been other cases that have  
17 applied *Johnson* to the guidelines and also to the Bail Reform  
18 Act. There's one -- I believe, it was a Hobbs Act.

19 THE COURT: Are you referring to any case where the  
20 922(g) was applied?

21 MS. BURGER: Specifically in -- in our circuit, no.

22 THE COURT: In any circuit?

23 MS. BURGER: Nothing from the circuit. There's been  
24 some chatter in terms of district court activity, but nothing  
25 that would be, I think, even persuasive for this Court.

1 THE COURT: Okay. But you're aware of no case,  
2 district court, circuit court, which would support your  
3 position that the crime of violence determination for 922(g)  
4 is no longer proper?

5 MS. BURGER: Well, I mean, let me add that there were  
6 other circuits that did not agree with *Dillard*. And so, if I  
7 recall correctly, the 4th Circuit may have been one of them  
8 that -- those circuits, for many years, have held that 922(g)  
9 is not a crime of violence. And so, those circuits would not  
10 have had to adjust their case law and that may have something  
11 to do with why there isn't any appellate -- and there's  
12 nothing that would, I think, be compelling or persuasive for  
13 this Court, but I'm asking the Court to consider not applying  
14 the crime of violence for the 922(g) count here.

15 With respect to the bail package that we've proposed,  
16 we've proposed -- proposed a \$50,000 bond, the majority of  
17 which is secured by property and vehicles. As I think the  
18 Court gleaned, probably from my submission, every family  
19 member who has pledged a bond is either a lifelong resident of  
20 Rochester or has a long-term history of living here in the  
21 past. They own property. They have long-term histories of  
22 employment. They are the most stable of people. They are  
23 willing to activate electronic monitoring and/or GPS at the  
24 Court's pleasure.

25 And two stable homes with family members have been

1 proposed as potential residences, should the Court release  
2 Mr. Wilbern on conditions. He could be supervised by U.S.  
3 Pretrial Services. I've indicated and agreed upon travel  
4 restrictions and various other conditions, including  
5 screening, mandated employment and education.

6 What the Court should gather from the family support  
7 he has is that he also has substantial ties to this community,  
8 having spent most of his childhood years here, graduated from  
9 high school here and has worked at various types of employment  
10 over the years, both here and elsewhere, but the majority of  
11 family is here in Rochester and they're very supportive of  
12 him. As the government alluded to, his very young son also  
13 lives here, in addition to multiple generations of his family.

14 Regarding criminal history, the two convictions that  
15 the government spent much time speaking of, in terms of the  
16 robbery and the shotgun matter from Virginia, those were  
17 convictions from 31 and 37 years ago. The pretrial report  
18 notes that he successfully completed supervision in connection  
19 with both of these offenses.

20 And as to the Virginia probation term, although he  
21 did move away from Virginia during the term of supervision, as  
22 the government candidly acknowledged, he did appear  
23 voluntarily and was permitted to continue on probation.

24 The Court should consider releasing Mr. Wilbern in  
25 light of the substantial bail package that we've presented, in



1 light of his substantial ties to the community and his  
2 family's substantial ties to the community and because, as it  
3 now seems to be confirmed, the government's case is based  
4 largely on DNA evidence that is highly unreliable.

5 We have an informant who, more than ten years after  
6 the fact, is described as saying that the person depicted in  
7 the video is likely Mr. Wilbern. We have, from the limited  
8 discovery we've received, photographs of this umbrella on a  
9 table that's not protected by any sort of sterile lab paper  
10 that I can tell. We know that the -- from what Mr. Gregory  
11 indicates, the umbrella was put on a desk. We're dealing with  
12 such tiny quantities of DNA here that one cell can skew the  
13 results.

14 There's testimony in the *Morgan* case from an LCN  
15 technologist at OCME who was testing LCN on a lighter and he  
16 became the major contributor in a mixed sample on the lighter,  
17 because one of his cells, despite all of their precautions,  
18 made it into the sample. So, we have a high-risk of cross-  
19 contamination. We have, as I indicated, photograph of the  
20 umbrella sitting on the table that had no protection  
21 whatsoever. We have a procedure that is highly unreliable.

22 If the Court looks at the President's Counsel of  
23 Advisors on Science and Technology, sort of a blue ribbon  
24 panel commissioned to investigate forensic science in the  
25 courts, they produced a report last year. And one of the

1 conclusions was that the subjective analysis of complex DNA  
2 mixtures has not been established to be foundationally valid  
3 and is not a reliable methodology. One of these samples --  
4 one of these tiny samples is a mixture of at least two  
5 contributors and this is the type of evidence that the  
6 President's Counsel has found to be unreliable.

7 In addition, there's another technology that OCME  
8 uses, it's a forensic statistical tool used by it to determine  
9 mixtures. That is another factor that may have come into play  
10 in this case. And again, we don't have what we need in terms  
11 of the lab reports, the electropherogram, the actual data that  
12 was that was created here, but to the extent that OCME, in  
13 addition, used this forensic statistical tool that has no  
14 reliability, this may have also contributed to unreliable  
15 conclusions with respect to the mixed sample.

16 We don't know if the dismissed scientist from OCME,  
17 people who were dismissed for misconduct and falsifying  
18 results, we don't know if any of those personnel were involved  
19 in producing this original sample back in 2011.

20 What I can tell you, Judge, is that the government  
21 continues to use OCME and that's of some concern to us. We're  
22 dealing with tiny samples. It seems to me there's probably  
23 the risk that the government is going to be consuming the  
24 samples entirely, using a process that the Department of  
25 Justice, in another case, found to be unreliable. I think

1 that will probably be the subject of some relief I ask for in  
2 the future, but I think it's of a concern that the Department  
3 of Justice has, in one occasion, said this is a reliable  
4 process and in other said it's very unreliable.

5 THE COURT: Does the fact that this allegedly  
6 unreliable process -- when taking into account some problems  
7 that you've identified -- was used to test DNA and the DNA  
8 came back identifying of all the people in the world,  
9 Mr. Wilbern, given his connections to Xerox, his connections  
10 to the credit union, his connections to people that may have  
11 identified him as being in the bank surveillance photographs  
12 and the wig and the FBI jacket, how do you respond to the  
13 argument of the government that that corroborates the  
14 reliability and the accuracy of the DNA evidence?

15 MS. BURGER: And my response to that will be to have  
16 Dr. Skuse testify to explain to the Court the studies that  
17 I've cited and admittedly, they're very complicated. And in a  
18 shorthand, if you're analyzing two --

19 THE COURT: Assuming everything you're saying is  
20 true, your argument is that it's an incredible coincidence  
21 that of all the people in the world whose DNA matched, it's  
22 Mr. Wilbern's that it matched to? That's just an unbelievable  
23 coincidence.

24 MS. BURGER: Well, I guess I will -- I will wait to  
25 see what was done by the lab, not only back in 2011, but also

1 with Mr. Wilbern's sample. One thing that we've learned from  
2 reviewing old court records is that, contrary to what the  
3 government has indicated, Mr. Wilbern was ordered to submit a  
4 DNA sample in conjunction with the Virginia conviction. I  
5 know the government's taken the position that he's never had  
6 to give a sample and therefore, you know, we couldn't run it  
7 against the NDIS or CODIS.

8 Well, we know that the FBI does not permit this type  
9 of DNA analysis to be uploaded to the national NDIS database,  
10 but it -- it can be uploaded to various state databases. And  
11 so, what's troubling to me, at this moment, is, why did the  
12 government not realize that a sample was previously ordered to  
13 be produced in conjunction with the Virginia matter?

14 And do we have a problem with the analysis of the  
15 swab -- not the swab, the surreptitious gathering of DNA that  
16 was relied on in the lab to make the comparison with  
17 Mr. Wilbern. I mean, I have concerns because of that.

18 So, I guess my -- my first question is, what did the  
19 sample actually look like that the lab received that was  
20 associated with Mr. Wilbern and how did that compare to the  
21 pristine sample that he was ordered to submit to in  
22 conjunction with the Virginia conviction and do we have some  
23 contamination in that supposedly controlled sample?

24 And I think that would -- having that information,  
25 which I don't have now, Judge, would allow me to answer that

1 question, because I don't think it's a safe assumption that  
2 the lab's analysis of DNA from the envelope was at all  
3 reliable, particularly in light of what I just indicated. I  
4 think that we would have gotten a hit based on -- based on  
5 reviewing court records, indicating that Mr. Wilbern was  
6 required to submit to a DNA sampling in conjunction with the  
7 Virginia case.

8 And at this point, I'd like to call Dr. Gary Skuse as  
9 the concluding portion of my proffer. I know the Court has  
10 already received his CV. And the purpose of my calling him  
11 is limited to discussing and explaining some of the  
12 complicated terms in the studies that I attached to my initial  
13 filing, which is document 17.

14 THE COURT: How long do you expect his direct  
15 testimony to be?

16 MS. BURGER: My direct, probably 15 minutes.

17 THE COURT: Okay. Go ahead.

18 MS. BURGER: Thank you. Defense calls Dr. Gary  
19 Skuse.

20 (The witness was sworn at 4:03 p.m.)

21 (An off-the-record discussion was held.)

22 THE COURT: Good afternoon.

23 THE WITNESS: Good afternoon.

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DIRECT EXAMINATION

BY MS. BURGER:

Q. Good afternoon, Dr. Skuse.

A. Good afternoon.

Q. Where do you work?

A. I am -- currently work at the Rochester Institute of Technology.

THE COURT: Ms. Burger, I have no objection if you want to use that podium.

MS. BURGER: Actually --

THE COURT: Okay.

MS. BURGER: I kind of --

THE COURT: Okay. I just wanted you to know.

MS. BURGER: Thanks, Judge.

BY MS. BURGER:

Q. What do you do there?

A. I'm a Professor of Biological Sciences.

Q. In the Bioinformatics Program?

A. It's the School of Life Sciences and I was associated with the Bioinformatics Program within that school for a number of years.

Q. Are you here today as an employee of RIT, as a professor?

A. No, I'm -- I am not.

Q. You're here because my office is paying you to testify?

1 A. That is correct.

2 Q. What's your education relating to your work at RIT?

3 A. Pretty much all of it. I earned a Bachelor's Degree in  
4 Biology from the University of Rochester and I followed that  
5 with a Ph. D. in Developmental Genetics, which is the study  
6 of the way genes are turned off and on during embryological  
7 development. I earned that at Syracuse University.

8 I followed that with post-doctoral training at  
9 Harvard Medical School in viral genetics, studying the way  
10 genes are turned off and on during viral infections. I  
11 followed that with some additional training at the University  
12 of Rochester Medical Center in human genetics and then, I  
13 joined the faculty there. Along the way, I studied ethics at  
14 Dartmouth College and embryology at the Woods Hole Marine  
15 Biological Laboratory.

16 Q. And do you receive federal grants to conduct research in  
17 the area of genetics?

18 A. Yes. I have in the past, yes.

19 Q. From what entities?

20 A. I received grants from the National Institute of Health  
21 and from the National Science Foundation.

22 Q. Are you a full professor at RIT?

23 A. I am, yes.

24 Q. Would it be accurate to say that you train students to  
25 become biomedical researchers and technologists?

1 A. That's absolutely correct.

2 Q. And also to perform comparative genomics?

3 A. Yes.

4 Q. Molecular imaging?

5 A. Yes.

6 Q. And to be geneticists themselves?

7 A. I hope that they will be, yes. I do train them for that.

8 Q. Do you teach undergraduate, graduate or both?

9 A. I teach both. Currently at RIT, I teach undergraduate  
10 courses and I mentor Master's level students in their thesis  
11 work in their research.

12 Q. I'm going to show you Defendant's A being marked for  
13 identification. Do you recognize that?

14 A. Yes, I do.

15 Q. What is it?

16 A. It's my curriculum vitae.

17 Q. Okay. Is that accurate and up-to-date as of today?

18 A. Yes.

19 Q. And it describes your education, your training, studies,  
20 research articles, things like that?

21 A. Yes, it does.

22 MS. BURGER: I would offer it as an aid to the  
23 hearing today.

24 THE COURT: Any objection?

25 MR. GREGORY: No.



1 THE COURT: Without objection, received.

2 (Defendant's Exhibit A was received in evidence.)

3

4 BY MS. BURGER:

5 Q. Now, in conjunction with coming here today, you and I  
6 have spoken before, correct?

7 A. Yes.

8 Q. And with respect to certain articles, I'm going to show  
9 you Defendant's B, C and D, premarked. Are you familiar with  
10 those articles?

11 A. I am.

12 Q. Have you read them?

13 A. Yes, I have.

14 Q. And you're familiar with them because I provided them to  
15 you?

16 A. That's correct.

17 Q. Did you read through the scientific article by Bruce  
18 Budowle titled, "Low Copy Number Typing Still Lacks  
19 Robustness and Reliability"? It's got the --

20 A. Yes.

21 Q. -- Exhibit C sticker?

22 A. Yes, I did.

23 Q. In that article, what did the author explain that he  
24 meant by the LCN typing lacking "robustness"?

25 A. So, he used the word robustness to describe the lack of

1 reproducibility.

2 Q. What does that mean?

3 A. It means when low copy number testing is done more than  
4 once on the same sample, the results can differ.

5 Q. So, what you mean, with your last answer, was that having  
6 the same data, looking at it multiple times, you don't see  
7 the same results?

8 A. Yes. Having the same DNA and testing it multiple times,  
9 you can get different results.

10 Q. Did the article -- and again, we're talking about  
11 Exhibit C, did the article mention peak height imbalance?

12 A. Yes. He referred to allelic imbalance in peaks that  
13 should have been derived from the same individual and he  
14 talked about how peak height imbalance typically happens, but  
15 the problem is exacerbated in low copy number analyses.

16 Q. You mentioned allele. What's an allele?

17 A. An allele is a sequence of DNA that can be different in  
18 different individuals. So, I refer to it as a version of  
19 that sequence of DNA. And it -- and it allows us to  
20 distinguish among individuals, if we actually look at them in  
21 a laboratory.

22 Q. And is the allele simply genetic material that we get  
23 from our parents?

24 A. That's all it is, yes.

25 Q. And at any specific position on a chromosome, in a single

1 human being's DNA, we could have information there, genetic  
2 information?

3 A. Yes.

4 Q. And how many versions of genetic information in a single  
5 human being's chromosome in that one location?

6 A. Right. Since we have pairs of chromosomes and we  
7 inherited each member of the pair from our parents, we can  
8 have at most two; one from our mother and one from our  
9 father.

10 Q. So, now that we've talked a little bit about alleles,  
11 could you explain again peak height imbalance --

12 A. Yes.

13 Q. -- in that context?

14 A. So, since we receive the same amount of DNA from each  
15 parent, we -- we do have the same amount of DNA from each  
16 parent in all of the cells of our body. In the laboratory,  
17 when we analyze those alleles, when we look at them, we would  
18 expect to see the same -- let me step back just a moment.

19 The way we look at them in the laboratory is, we use  
20 a process called a polymerase chain reaction which recognizes  
21 the DNA that's in those alleles and amplifies it so that  
22 there's enough to analyze.

23 Q. And when you're reading -- talking about Exhibit C, Bruce  
24 Budowle's article, is he talking about peak height imbalance  
25 in the context of polymerase chain reaction?

1 A. Yes, he is, yes.

2 Q. And by the way, these articles that are in front of you,  
3 Exhibits B, C and D --

4 A. Yes.

5 Q. -- are these articles that you rely on in your  
6 professional work as a professor in the Bioinformatics  
7 Program at RIT?

8 A. All the time. That's what we do.

9 Q. And based on your training and education, were you  
10 familiar with the terms and concepts discussed in these  
11 articles?

12 A. Yes.

13 Q. Now, the article that we're talking about, did it also  
14 mention -- and it's Exhibit C, did the article mention allele  
15 drop-out?

16 A. Yes.

17 Q. What did the article say about that?

18 A. Well, so, allele drop-out is a phenomenon where there may  
19 be an allele present, but it's not detected by the polymerase  
20 chain reaction. And the author said, that while that does  
21 occur, it occurs more frequently with small amounts of DNA,  
22 such as those that are analyzed with low copy number testing.

23 Q. So, one of the complaints of the author was that with low  
24 copy number or LCN DNA testing, you could have the absence of  
25 an indicator of genetic material, even though there's

1 actually genetic material present?

2 A. That's correct. He described it as the failure to detect  
3 an allele that's really there.

4 Q. And the other end of the spectrum, did the author mention  
5 drop-in -- allele drop-in?

6 A. Yes, he does.

7 Q. And what did he explain about that?

8 A. Allele drop-in occurs when extraneous DNA -- and what I  
9 mean by that is DNA that didn't come from the individual  
10 who's the contributor of the DNA that's being analyzed. When  
11 extraneous DNA gets into the system -- and it can come from  
12 any number of sources including contamination of the reagents  
13 that are used in the laboratory, could be from an article of  
14 evidence that had someone else's DNA mixed with the first,  
15 could come from a number of places.

16 Q. So, what you're saying is that the author, in his  
17 description of allele drop-in, described that you could have  
18 essentially a false positive where there is no DNA  
19 attributable to the sample being analyzed?

20 A. That's an accurate way of describing it, yes.

21 Q. So, with low copy number DNA testing, the author  
22 complains about there being peaks where there shouldn't be  
23 peaks and no peaks where there should be peaks?

24 A. That's correct.

25 Q. And a peak being a representation of genetic material at

1 a particular location?

2 A. Yes. The peak is a representation of the products of the  
3 polymerase chain reaction.

4 Q. Did the article mention stutter peaks?

5 A. The article did.

6 Q. What did the author explain about stutter peaks?

7 A. So, stutter peaks occur infrequently, but they do occur  
8 in PCR when you get a misalignment of the DNA that's being  
9 amplified. And you essentially get a peak that's one copy --  
10 not sure if I need to explain that -- but one -- one peak  
11 less than the peak should be. And he said that that problem  
12 is exacerbated in low copy number analyses.

13 Q. Does that affect the accuracy of the final determination,  
14 according to the author?

15 A. Yes.

16 Q. Did the author mention stochastic effect?

17 A. Yes, he did.

18 Q. What did the author explain about what that meant?

19 A. Well, stochastic effects, generally speaking, are random  
20 effects. And he emphasized that random effects are, again,  
21 exacerbated in low copy number analyses. And basically,  
22 that's an effect that has to do with the fact that you're  
23 analyzing such a small amount, the signals that you get are  
24 relatively small and therefore, random events are more  
25 visible.

1 Q. By a random event, that would be a report of information  
2 where there is no genetic material relating to the sample  
3 being analyzed?

4 A. It would be the equivalent of a drop-out that you  
5 referred to earlier.

6 Q. Okay. And did the author mention stochastic threshold?

7 A. Yes.

8 Q. What did he explain about stochastic threshold?

9 A. Well, he explained very well, in my opinion, that  
10 stochastic thresholds exist in DNA typing to -- they're  
11 essentially an indication of how confident the laboratory is  
12 in what they're looking at. And stochastic thresholds need  
13 to be established in laboratories, in each individual  
14 laboratory, so each individual laboratory can have confidence  
15 in what they're seeing. And he said those are difficult --  
16 he may have said impossible -- but I'll say difficult to  
17 establish with low copy number because they are no good  
18 controls for validating the technique.

19 Q. Now, with respect to Exhibit B, an article by Angela van  
20 Daal titled, "LCN DNA Analysis: Limitations Prevent "General  
21 Acceptance" ". Did you read that article?

22 A. Yes, I did.

23 Q. Okay. And in that article, the author contrasted the  
24 reliability of traditional DNA analysis with LTN -- LCN  
25 analysis, correct?

1 A. Yes, she did.

2 Q. And did the author report that LCN was as reliable as  
3 traditional DNA analysis?

4 A. No. In fact, the author said they were not.

5 Q. Could you tell us what were the failures or weaknesses of  
6 LCN analysis identified by the author in that article?

7 A. Well, the other number of points, one of those points was  
8 that good validation studies are difficult, if not  
9 impossible, to do with low copy number. So, simply saying  
10 that we validated the less sensitive, more common technique,  
11 doesn't mean that the same validation applies to the low copy  
12 number technique.

13 She also commented about -- she has a very  
14 informative table -- about how many cells worth of DNA there  
15 are in the samples and it's -- it's striking how few cells  
16 there are and in that light, how important contamination  
17 could be. When you've only got three cells of evidence, one  
18 cell coming from someone else could really mislead the  
19 interpreter.

20 Q. And did Ms. van Daal mention a problem with LCN analysis  
21 not being reproducible?

22 A. Yes, quite a bit actually, yes.

23 Q. What did she say about that?

24 A. Well, she said it's -- it's not reproducible and it's --  
25 it's generally accepted in the field that it's not



1 reproducible.

2 Q. By the way, what do you mean by -- what does she mean by  
3 reproducible?

4 MR. GREGORY: Judge, I'm going to object. How can he  
5 interpret what --

6 THE COURT: Sustained.

7 BY MS. BURGER:

8 Q. What did Ms. van Daal say?

9 MR. GREGORY: And also, don't these documents just  
10 speak for themselves?

11 THE COURT: I'm going allow a little bit more. We're  
12 coming up on the 15 minutes, but go ahead.

13 BY MS. BURGER:

14 Q. What did Ms. van Daal say about LCN analysis not being  
15 reproducible?

16 A. Well, she says that when you analyze the same sample more  
17 than once, you get different results, which is the definition  
18 of irreproducibility.

19 Q. And with respect to the final article by Bruce Budowle  
20 titled, "Validity of Low Copy Number Typing and Applications  
21 to Forensic Science" --

22 A. Yes.

23 Q. -- this article was another one you read, correct?

24 A. I'm sorry. What was your question?

25 Q. This was another of the articles that you read?

1 A. Yes, it is.

2 Q. Okay. It mentioned many of the same concepts that we've  
3 been discussing?

4 A. Yes.

5 Q. And would it be accurate to say that, in that article,  
6 the author raised a concern that there was a greater  
7 potential for error, compared to conventional STR typing with  
8 LCN?

9 A. Yes, he did.

10 Q. And that author also mentioned in his article that LCN  
11 profiles are not generally reproducible?

12 A. Yes, he did.

13 Q. Which, in that article, discussed having different  
14 results every time you run the same sample?

15 A. And -- and having a challenge to determine which of those  
16 is correct and which of them is not.

17 MS. BURGER: Thank you, Judge. I think that the  
18 exhibits are already before the Court, but for purposes of the  
19 hearing I would offer them as aids to the Court.

20 THE COURT: All right. I think they're part of the  
21 record, but any objections?

22 MR. GREGORY: No, Your Honor.

23 THE COURT: All right. Okay.

24 (Defendant's Exhibits B, C and D were received in evidence.)

25

1 THE COURT: Before you do cross, I just have one  
2 question on one of these articles. I wasn't sure whether you  
3 were going to cross on them or not. I think the second  
4 article, which is the longest article, which is "Validity of  
5 Low Copy Number Typing and Applications in Forensic Science"  
6 by Bruce Budowle.

7 THE WITNESS: Yes.

8 THE COURT: Can you take a look at the conclusion?

9 THE WITNESS: Yes.

10 THE COURT: It discussed the findings, but I just  
11 want to find out what your view is on the conclusion.

12 THE WITNESS: Yes.

13 THE COURT: It says, LCN typing, by its nature,  
14 cannot be considered robust. However, currently, it does have  
15 a place in the forensic science toolbox, primarily for  
16 developing investigative leads. What does that mean to you?

17 THE WITNESS: That means, to me, that it's good for  
18 identifying suspects, but not good for convicting people.

19 THE COURT: Okay. So, what it means to you is that  
20 if this particular test was used, the LCN test was used to  
21 identify a suspect and then further investigation provided  
22 corroborative evidence, that the LCN would be useful in, at  
23 least, identifying someone to investigate further?

24 THE WITNESS: That's what -- that's how I interpret  
25 that.

1 THE COURT: Okay. Any cross-examination?

2 MR. GREGORY: Just a few questions.

3

4 CROSS EXAMINATION

5

6 BY MR. GREGORY:

7 Q. The articles that you were supplied with, prior to  
8 Ms. Burger giving them to you, had you ever seen them before?

9 A. To be -- I can't answer that. I'm not sure if I have or  
10 not. I have a large collection of articles. I'm not really  
11 sure.

12 Q. Off the top of your head, before she gave it to you, do  
13 you recall reading those articles ever before?

14 A. No, I do not.

15 Q. The --

16 (An off-the-record discussion was held.)

17 BY MR. GREGORY:

18 Q. You would agree that if a DNA analysis on a piece of  
19 evidence that was able to develop a profile at all 15 loci,  
20 that would be considered a full profile?

21 MS. BURGER: Judge, this is way beyond the scope of  
22 the proffer of the witness. I did not offer him as an expert  
23 offering an opinion about the reliability of the process or  
24 anything beyond explaining the words that were in the  
25 articles. I would object.

1 THE COURT: Overruled.

2 THE WITNESS: Depends what kit was used to generate  
3 them. There are PowerPlex kits that start at 16 going to, I  
4 think, 23. So --

5 BY MR. GREGORY:

6 Q. Let me just stop you there.

7 A. Okay.

8 Q. If you're -- if you have a kit, any kit that is  
9 reputable, accredited, that you are familiar with and it  
10 had a match at 15 loci, plus the 16th being the sex, you  
11 would consider that to be a full profile, correct?

12 A. Only if the kit was designed to do 15 plus 1.

13 Q. Okay. If the kit was designed --

14 A. To do 15 plus 1, I would call that a full profile.

15 Q. And you know that the FBI, in the past, in order to  
16 upload information into CODIS, would require a hit at 13  
17 loci?

18 A. When the kits were only able to do 13; that is correct.

19 Q. All right.

20 A. So-called CODIS Core Loci.

21 Q. Okay. You've previously testified that if a person using  
22 a kit that was designed to match at all 15 loci, I think you  
23 testified in another case, that the probability of it being  
24 someone other than a suspect is one in 6 quintillion; isn't  
25 that fair?

1 A. Those are the sorts of numbers that were used, yes.

2 Q. No, no. Did you say that?

3 A. If you can point to a specific case; I've done a number.

4 Q. Let me ask you this. Do you recall testifying in the  
5 case of Philip Ruiz, in federal court, when you were asked  
6 certain questions from a John Humann from the Federal  
7 Defender's Office?

8 A. Oh, yes, I do.

9 Q. And you recall, in that case, that the technology is very  
10 different in the 2000's than it was in the 80's and the 90's?

11 A. Oh, very much different, yes.

12 Q. Because the testing kits that are out there are so much  
13 more sensitive, they're able to detect DNA at much lower  
14 levels, correct?

15 A. That is correct, yes.

16 Q. And I think, in response to a question posed by  
17 Mr. Humann, you answered -- and you answered into whether or  
18 not a single cell could be tested, you specified, the thing  
19 that has made us better primarily are detection techniques.  
20 So, back then, we used to need enough DNA so that when we  
21 made a million copies of it, there was enough to begin with  
22 so that we can detect it and we've now gotten to the point  
23 where we can analyze DNA from a single cell.

24 A. I've been told that can be done in a laboratory, yes.

25 Q. Okay. Did you testify to that under oath in a federal

1 court?

2 A. Apparently, I did.

3 Q. And you testified to that because it's true, right?

4 A. In a research laboratory, it's absolutely true.

5 Q. And it's true because the scientific methods that are  
6 used to test DNA are so much better now than they were in the  
7 past, correct?

8 A. Yes.

9 Q. A single cell contains about six picograms of human DNA,  
10 correct?

11 A. That's what I'm told, yes.

12 Q. And that would be considered a low copy number, correct?

13 A. One cell? It's as low as it gets, yes.

14 Q. But you have also testified that you can test down to six  
15 picograms, if we follow your logic?

16 A. In a research laboratory, yes.

17 Q. And I think you testified today that when you used low  
18 copy analysis, certain stochastic events occur, like allele  
19 drop-in, allele drop-out, stutter and the like?

20 A. I testified that that's what these authors said, yes.

21 Q. Well, is that your understanding that that can happen?

22 A. It is my understanding.

23 Q. Isn't it also true that that can happen if you're testing  
24 high copy numbers?

25 A. That's true.

1 Q. And given the fact that it can happen in both high copy  
2 number situations and low copy number situations, the  
3 particular lab that is testing it has got to come up with  
4 procedures or protocols that will assist them in interpreting  
5 when those stochastic events occur, correct?

6 A. Yes.

7 Q. So, if I'm an analyst and I've done hundreds of low copy  
8 number testing, you would agree with me that I would -- as  
9 long as I'm following the protocols of my lab, you would  
10 agree with me that I'd have a pretty good idea of when those  
11 stochastic events are occurring, correct?

12 A. When -- if you could clarify? When you say a feeling, do  
13 you meant a gut feeling about whether you're --

14 Q. When you see it after you take the electropherogram and  
15 you have it on the screen, if you've analyzed hundreds of  
16 these things, is it fair to say that a more experienced  
17 person -- analyst is looking at that, is going to be able to  
18 recognize when those stochastic events occur and adjust their  
19 interpretation? Is that fair to say?

20 A. I'm not sure that that's fair, because you rejected my  
21 contention that you're asking for a gut feeling. So, I have  
22 a lot of experience and I know when things are feeling right  
23 or they don't feel right.

24 Q. I'm not asking about a gut feeling.

25 A. I know. That's --



1 Q. Right. As long as it looks clear.

2 A. Okay.

3 Q. If they follow the accredited and approved procedures and  
4 protocols for evaluating DNA when stochastic events occur --  
5 so, it's not a gut feeling, they're following the  
6 protocols -- you would agree with me that a very experienced  
7 analyst would be able to determine when those events  
8 occurred, correct?

9 A. They would suspect that they occur, yes. They wouldn't  
10 know for certain.

11 Q. Well, as opposed to a less-experienced analyst?

12 A. So, the reason protocols exist is so that someone, on  
13 their first day in the laboratory, should be able to generate  
14 reliable results. That's why standard operating procedures  
15 exist.

16 Q. If I drive down the road and there's a number of  
17 obstructions in front of me, the first time I drive down that  
18 road, I might hit one of those obstructions, correct?

19 A. Hope not, yes.

20 Q. But if I drive down that road 400 times, I'm going to  
21 recognize where those particular obstructions are and account  
22 for that, correct?

23 A. It's likely.

24 Q. As we sit here today, do you have any information  
25 whatsoever that allele drop-in or drop-out or stutter

1 occurred in this case?

2 A. Not as we sit here today.

3 Q. And I know you're just interpreting the paperwork that  
4 you have before you, but you're not testifying here today  
5 that LCN testing is categorically 100 percent unreliable,  
6 correct?

7 A. I am not saying that, no.

8 THE COURT: What you are saying is, in your opinion,  
9 it's less reliable than traditional DNA testing?

10 THE WITNESS: Yes. Very accurately what I'm saying  
11 is these authors say that it's less reliable than the more  
12 typical high copy number testing.

13 BY MR. GREGORY:

14 Q. Right. And you know, because you do an awful lot of  
15 reading on these things, that there's just as many articles  
16 on the other side of this argument than there are in front of  
17 you?

18 A. Well --

19 Q. Is that fair to say?

20 A. I'm not -- I can't quantify how many there are articles  
21 on the other side, of course.

22 Q. Of course. Because scientists disagree?

23 A. That's how science works.

24 Q. That's how science --

25 A. Kind of like a courtroom. We challenge each other, we

1 further our investigations and we determine who has a better  
2 picture of the way nature really is.

3 Q. And then, the jury decides who's right, right?

4 A. Well, not in my world, but in your world, yes.

5 MR. GREGORY: Okay. Thank you.

6 THE COURT: Anything else?

7 MS. BURGER: Yes.

8

9 REDIRECT EXAMINATION

10

11 BY MS. BURGER:

12 Q. Mr. Gregory asked you a couple questions about these new  
13 kits and how reliable they are. So, I have one or two  
14 questions about that to begin with. With respect to these  
15 kits and their reliability, the kits come with instructions  
16 from the manufacturer about their proper usage, correct?

17 A. Yes.

18 Q. And the instructions from the manufacturer are the way to  
19 achieve the highest degree of reliability by using the  
20 kits --

21 A. Yes.

22 Q. -- correct?

23 A. Yes.

24 Q. So, with respect to the kits that are described and the  
25 testing was described in the articles you read, were these

1 kits being used to create 28 replications of the DNA, or were  
2 they being used above and beyond what the manufacturer called  
3 for?

4 A. They were being used above and beyond what the  
5 manufacturer called for.

6 Q. So, the OCME, according to these studies, OCME or other  
7 labs doing LCN, they don't follow the manufacturer's  
8 instructions for the kit?

9 A. That is true.

10 Q. And since Mr. Gregory asked you your opinion about some  
11 of these things, in your opinion, would that affect the  
12 reliability of the very reliable kit if you don't use it  
13 according to the manufacturer's instructions?

14 A. The reason we -- in my laboratory, the reason we purchase  
15 kits is because we essentially offload the development, the  
16 validation and the quality assurance to the manufacturer of  
17 the kit. We buy it with the confidence that if we follow the  
18 instructions, it's going to work the way they told us it  
19 would.

20 Q. Now, with respect to the Ruiz case that Mr. Gregory asked  
21 you about --

22 A. Yes.

23 Q. -- did that case involve a lab doing LCN DNA testing?

24 A. No, it did not.

25 Q. Okay. Do you recall that that lab failed to follow the

1 manufacturer's recommendations in using the kits?

2 A. There was no mention of it.

3 Q. Okay. You mentioned a couple times, not in a research  
4 lab?

5 A. Okay.

6 Q. Could you explain what you meant in terms of how doing  
7 your work in a research lab is different, if at all?

8 A. Yes. It's actually related to the comments at the end  
9 when we talked about a jury. In a research laboratory, our  
10 goal is to learn things we didn't know before. We need to  
11 learn more about nature. I'm called a natural scientist  
12 because I try to understand nature.

13 And the way it works in a research laboratory is we  
14 do experiments, we interpret them, we publish them in peer  
15 review journals. And if another laboratory wants to  
16 reproduce my results, they will. And if they disagree with  
17 them, that's how science progresses, because we'll learn a  
18 little bit more if they disagree, because then my laboratory  
19 apparently will look more closely at it and say, okay, why  
20 did we disagree? Is it a difference in the procedure we used  
21 or is there really something going on that my laboratory  
22 didn't detect?

23 So, research laboratories, our goal is to push the  
24 frontiers of doing things people didn't do before. And if we  
25 make mistakes, someone else finds it. That's part of the

1 system and we progress our understanding of science.

2 Q. And in your instance, if somebody makes a mistake,  
3 nobody's going to prison?

4 A. That's an enormous difference, yes.

5 Q. And one final area that Mr. Gregory talked to you about,  
6 he talked about approved procedures and sort of essentially  
7 validations of the procedures and I think you were saying on  
8 day one, the new scientist should be able to get the same  
9 results following these procedures. So, questions related to  
10 that.

11 With respect to these sort of validation studies  
12 that produce lab protocols, is there any correlation between  
13 the test samples used in the validation study being  
14 reflective of the casework that'll be done in the lab?

15 A. No. Actually --

16 Q. Is there a serious problem?

17 A. -- that's a serious flaw in the validation process.

18 Laboratory samples are clean. They're pure. We know what  
19 they are when we add them to the system. Pristine is a word  
20 that people often use. Whereas, at a crime scene, you don't  
21 know what you got. I mean, it could be contaminated, it  
22 could come from multiple sources, it could be degraded. Even  
23 our quantification of how much is there is not as accurate as  
24 it could be. So, in a laboratory, under controlled  
25 conditions, it's as good as it gets. It's the best we could

1 possibly do.

2 Q. And then, one of the complaints in these studies, with  
3 respect to the so-called validation being done with LCN, is  
4 the validation's being done using pristine samples that  
5 aren't anything at all like the casework that's actually  
6 ultimately going to be done?

7 A. That's what the author's saying and goes further to say  
8 that there is no good control. You can't actually reproduce  
9 the DNA you get from a crime scene because you don't know --  
10 you don't understand it.

11 Q. So, in this context, and the context of Mr. Gregory's  
12 questions, these so-called validation protocols really don't  
13 provide any sort of safety net in the context of LCN testing  
14 based on the articles you read?

15 A. Right. They're rough guidelines, but they're not very  
16 accurate.

17 MS. BURGER: Thank you, Judge.

18 THE COURT: Anything else?

19 MR. GREGORY: No, Judge.

20 THE COURT: All right. Does that conclude the  
21 defense proffer?

22 MS. BURGER: Just one second, Judge. Thank you,  
23 Judge, I think we're finished.

24 THE COURT: Anything else from the government?

25 MR. GREGORY: No, Judge.

1 THE COURT: All right. I'm going to take a 15-minute  
2 recess. I appreciate the proffers, they were very helpful and  
3 I'll give you my decision when we reconvene. Jennifer, 15  
4 minutes. Thank you, sir.

5 THE WITNESS: Thank you.  
6 (The witness was excused.)

7 THE CLERK: All rise.  
8 (Brief recess)

9 THE COURT: All right. I have heard the proffers and  
10 the testimony that's been presented by both defense and the  
11 government and I am ready to rule.

12 Mr. Wilbern, I'm going to direct my remarks to you,  
13 since it's your liberty that's at stake here. The government  
14 has moved for detention. The law allows them to move to  
15 detain you without bail. They can move on one or two grounds.  
16 Here, they've moved on two grounds. The two grounds are that  
17 you present a risk of flight and the second ground is that you  
18 present a danger to the community.

19 With respect to the ground on risk of flight, the  
20 government's burden is to prove that you present a risk of  
21 flight by a preponderance of the evidence. With respect to  
22 danger to the community, the government's burden is higher.  
23 They must prove that by clear and convincing evidence.

24 Where a defendant in federal court is charged with  
25 certain crimes, the government's burden to meet one or both of



1 these standards is aided by what the lawyers call a  
2 presumption. And essentially, Congress has passed a law which  
3 says that if a defendant is charged with a certain type of  
4 crime, that the Court has to presume that the person is  
5 dangerous and the Court has to presume that the person  
6 presents a risk of flight.

7 Now, that presumption can be rebutted, but it is a  
8 presumption that I believe applies in this case to both the  
9 charges that you currently face.

10 In other words, you have two charges; one is having  
11 been previously convicted of a felony, you possessed a firearm  
12 and ammunition and the second is that in the course of a bank  
13 robbery, you caused the death of another person by discharging  
14 a firearm. Both those crimes, in my view, qualify as crimes  
15 in which this presumption would apply.

16 And therefore, because the Grand Jury has returned an  
17 indictment charging you with these two charges, I am applying  
18 the presumption that I must, that I'm required to apply,  
19 presuming that, as we start the hearing, that you present a  
20 risk of flight and that you present a danger to the community.

21 Now, as I indicated to you, that presumption is  
22 rebuttable and I've listened carefully to the proof that the  
23 government's presented and the proof that Ms. Burger has  
24 presented on your behalf, including the testimony of the  
25 professor.

1           As you can tell, this is not a trial. We don't have  
2 formal rules of evidence in bail hearings. The trial would  
3 come later and all the protections that normally inure to  
4 trials, such as hearsay rules, rules of evidence, rules of  
5 confrontation would apply, but they don't apply in a hearing  
6 like this.

7           So, the reason I tell you that is because you are  
8 presumed innocent and that presumptions stays with you  
9 throughout these proceedings. And although I have to make  
10 certain findings here that I'm required to make, as part of  
11 the bail process, I want you to know that none of the findings  
12 I make here will affect or denigrate the presumption of  
13 innocence which you're cloaked with and you will continue to  
14 be cloaked with throughout these proceedings until either a  
15 finding of guilt has been made or a conviction has been  
16 entered by way of a plea of guilty. So, that presumption  
17 stays with you throughout the proceedings.

18           There's no litmus test for me to determine whether  
19 somebody's either going to come back to court or flee or be a  
20 danger to the community. If there was, we'd run the  
21 information through a computer and find out what it is and  
22 judges would have a lot easier time in making decisions on  
23 bail. They are difficult decisions.

24           But the law provides a number of factors that I have  
25 to consider. One of the factors is the strength of the

1 government's case and we've spent a lot of time on that factor  
2 today. But I want to tell you, as often the defense reminds  
3 me, even though the defense really brought up this issue, this  
4 is the least important factor. Of all the factors, the  
5 strength of the government's case is the least important.

6 But because we spent a lot of time on it,  
7 particularly discussing the DNA, I feel compelled to spend  
8 some time discussing it. And after listening to the evidence  
9 and considering the arguments, including the testimony of the  
10 professor, I conclude that even if I was to assume, for the  
11 sake of argument, that low copy number or LCN DNA testing is  
12 less reliable than traditional DNA testing, I don't believe  
13 those test results in this case could be used or viewed in a  
14 vacuum.

15 Even if that form of testing is less reliable, the  
16 evidence presented to me indicated that it matched your DNA.  
17 Now, whether that match was conclusive evidence that might be  
18 attributed to traditional DNA testing, or simply an  
19 investigative lead, as one of the articles suggested it would  
20 be, I have to look at the other facts presented here and the  
21 other facts is that that so-called less reliable evidence  
22 identified you and there are other facts which have been  
23 presented to me which connect you to the crimes you are  
24 charged with.

25 The DNA identified someone who worked at Xerox at or

1 about the time that the crimes occurred. It identified  
2 someone who was familiar with the location of the crime, who  
3 banked at the credit union before the robbery. It identified  
4 someone who stopped banking there after the robbery.

5 It identified someone who the government tells me  
6 that witnesses will identify as someone they recognize from  
7 the bank robbery surveillance photos. It identified someone  
8 who the government tells me witnesses will testify that owned  
9 and wore a wig like the wig that was used or depicted in the  
10 bank's surveillance photographs. It identified someone who  
11 the government tells me witnesses will testify that had and  
12 wore the same type of FBI jacket as depicted in the bank  
13 robbery photos.

14 It identified someone who the government tells me and  
15 has proffered to me had a motive for the robbery based on  
16 several factors, including the fact that this person felt  
17 Xerox discriminated against them in terms of their employment  
18 and fired them. And someone who, at the time of the robbery,  
19 was in a state of financial hardship with mounting bills and  
20 no employment.

21 With respect to the second charge, the felon in  
22 possession charge, there's no dispute that you had a  
23 previously -- a previous felony conviction for bank robbery.  
24 Because of that previous felony conviction, it is illegal for  
25 you to possess a firearm or ammunition.

1           The government has proffered to me that at a garage  
2 where several witnesses will testify that you stored your  
3 belongings and your belongings were found in that garage, a  
4 search warrant was executed and four semi-automatic rifles,  
5 two of which were loaded, were found with your belongings.

6           And in a residence which you formerly resided in,  
7 from which you were evicted, although it appears you may have  
8 stayed there after the eviction, personal items belonging to  
9 you were found which included ammunition, ammunition clips, a  
10 loaded shotgun and full body armor. So, at least from my  
11 point of view at this juncture, considering that factor, it  
12 appears to me that the evidence on both these charges is very  
13 strong against you.

14           The second factor I'm obligated to consider is the  
15 nature and circumstances of the crime, you know, how serious  
16 is the crime? That's something that I need to consider in  
17 deciding whether you should be released on bail. And I think  
18 no one would dispute that there is no more serious offense  
19 than murdering someone or shooting someone during the course  
20 of a robbery. And the facts surrounding this particular  
21 murder are extremely violent and heinous.

22           The third factor I have to consider is someone's  
23 history and personal characteristics. One of the things that  
24 I'm obligated to consider is, has the person ever been in  
25 trouble before? And your criminal record is troubling.

1           You have at least three prior felony convictions,  
2 including one for a bank robbery in which the suspect, meaning  
3 you, was charged with using a weapon. And you were convicted  
4 of that crime in 1980.

5           The second felony conviction was in 1986 and you were  
6 found guilty of possession of a sawed-off shotgun, which was a  
7 felony and also guilty of carrying a concealed weapon, which  
8 was a misdemeanor. And the third felony crime was forgery,  
9 which occurred in 1992 and for which you were sentenced to  
10 five years incarceration, which sentence was suspended and I  
11 think you received a term of probation.

12           So, you have three felony convictions and that,  
13 obviously, is of some concern to the Court in terms of your  
14 personal characteristics. In addition, the facts of this case  
15 and the criminal history indicate that you have an association  
16 and affinity for weapons, guns, ammunition, body armor. And  
17 these facts also give the Court great pause in terms of your  
18 danger to the community.

19           There are aspects of your history and characteristics  
20 which give the Court concerns about your risk of flight.  
21 There's a period of time that the government alleged to me  
22 that you were on probation and you absconded from probation  
23 for a period of five years, including improper and  
24 unauthorized foreign travel to Japan. That suggests to me  
25 that if I was to release you and set reporting conditions,

1 that you may not follow those conditions because you have a  
2 history of not reporting. In addition, the government tells  
3 me that these crimes carry with them a possible penalty of  
4 life in prison and that too, in my mind, presents a potent  
5 incentive to flee.

6 Finally, I have considered your bail proposal and  
7 your family's willingness to post some equity and some homes  
8 to secure your bail. While I find that kind of family support  
9 helpful, in this particular case, given all that I've talked  
10 about, I conclude that it's inadequate, in my mind, to assure  
11 either your future appearance or alleviate danger to the  
12 community that you would present if released.

13 Therefore, on both indictments, I find the government  
14 has demonstrated, by clear and convincing evidence, that no  
15 combination -- or no condition or combination of conditions  
16 will reasonably assure the safety of the community. And as  
17 proven by a preponderance of the evidence, that no condition  
18 or combination of conditions would reasonably assure your  
19 future appearances or alleviate the risk of flight you present  
20 if released. Therefore, the government's motion to detain you  
21 is granted.

22 Now, you have the right to have my decision reviewed  
23 by Judge Siragusa or another District Court Judge. By law,  
24 that judge must evaluate the evidence presented and the record  
25 here de novo, which means take a fresh look at it. Ms. Burger

1 is very familiar with the process to do that and I'm sure  
2 she'll explain it to you. I take no offense if you want my  
3 decision reviewed. And if you do, I would encourage you to do  
4 it. Because you're incarcerated now, I'll do everything in my  
5 power to move the case along as quickly as I can, given -- I  
6 know your lawyer's interest and the government's interest in  
7 protecting your rights as we go through this prosecution. So,  
8 I believe we have a motion schedule in place?

9 MS. BURGER: We don't. We have a status for  
10 discovery.

11 THE COURT: Okay. And I believe the time is excluded  
12 until that status conference?

13 MS. BURGER: Yes.

14 THE COURT: All right. Anything else we need to do?

15 MR. GREGORY: No, Judge. Thank you.

16 THE COURT: All right. Thank you. Court adjourned.  
17 (Proceedings ended.)

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I certify that the foregoing is a  
correct transcription of the proceedings  
recorded by me in this matter.

s/ Megan E. Pelka, RPR

Court Reporter,